Filed 3/7/11 P. v. Kemp CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LEONARD RUDOLPH KEMP, JR., Defendant and Appellant.	E049705 (Super.Ct.No. RIF139801) **OPINION**

APPEAL from the Superior Court of Riverside County. W. Charles Morgan, Judge. Affirmed.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Leonard Rudolph Kemp confronted a 16-year-old boy and his friend in the street and took the boy's cellular telephone. When the boy gave chase in an attempt to get his phone back, defendant shot at him at point-blank range, wounding him in the shoulder.

Defendant was convicted of attempted murder, assault with a deadly weapon, and robbery, along with personal use of a firearm enhancements.

Defendant now contends:

1. Insufficient evidence supported his conviction of attempted murder, as he had no intent to kill.

2. The standard Judicial Council of California Criminal Jury Instruction (CALCRIM) No. 600 is legally erroneous.

3. The trial erred by failing to respond properly to the jury's questions during deliberations.

We affirm the judgment.

I

PROCEDURAL BACKGROUND

Prior to his first trial, defendant pleaded guilty to three counts stemming from an incident occurring on July 20, 2007: robbery (§ 211; count 4), possession of a billy club (§ 12020, subd. (a); count 5), and burglary (§ 459; count 6). Defendant went to trial for the charges occurring on July 18, 2007 (the pertinent charges here): premeditated, deliberate, and willful attempted murder (§§ 664/187; count 1) and robbery (§ 211; count

2) against A.B., with the special allegation as to both counts that he personally used a firearm causing great bodily injury (§ 12022.53, subd. (d)) and assault with a firearm (§ 245, subd. (a)(2); count 3) with personal use of a firearm (§ 12022.5, subd. (a)). The first trial ended in a mistrial when the jury could not reach a unanimous decision. In the second trial, the jury found defendant guilty of all counts (but found that the attempted murder was not willful, premeditated, and deliberate), with the attendant gun allegations found true for all counts.

The trial court sentenced defendant to state prison for the determinate term of seven years for the attempted murder, plus the indeterminate sentence of 25 years to life on the gun use causing great bodily injury enhancement. Counts 2 and 3 and the enhancements for those counts were stayed pursuant to section 654. For counts 4, 5, and 6, the trial court imposed a total five-year concurrent sentence.

II

FACTUAL BACKGROUND

A. *Prosecution*

In 2007, A.B. was 16 years old and was attending high school in Riverside. In July of that year, A. attended extracurricular activities at school. On July 18, 2007, A. attended such activities from about 3:00 p.m. until about 7:00 p.m. He then walked home with a friend who also participated in the activities, D.W.[1] It was still light outside as

[1] D. was not available for trial so his testimony from the prior trial was read into the record.

they walked home. As he was walking, A. was texting on his cellular telephone, which he identified as a Sidekick 3 (Sidekick).

D. and A. approached an intersection and saw a group of "guys" and "girls" standing nearby. As the boys walked away from the group, two males ran up behind them. A. identified the two boys as D.S. and defendant at trial, but he did not know either of them at the time of the incident. D. recognized one as a boy named D.S., but he could not definitively identify defendant.

Defendant was holding a gun that was black with a brown handle. D. described it as a sawed-off shotgun. A. thought it looked like a pellet gun. Defendant said to A., "Give me your kick," which A. indicated was the nickname for the Sidekick. A. refused. Defendant was pointing the gun at the ground. Defendant asked again for the Sidekick and then "pumped" the gun and shot at the ground. A. saw smoke coming from the gun, and it made a "big bang." A. was afraid for his life. Defendant grabbed the Sidekick, which A. had attached to a clip on his waist, and ran away.

Without thinking, A. ran after defendant to get the phone back because he had paid for it with his own money. A. followed defendant up the street. Defendant tripped and fell to the ground.[2] A. stood over defendant hoping to get his phone back. A. recalled that defendant pointed the gun toward him and then shot at him while he was within one foot. It looked to A. that defendant was pointing the gun at his face. D. saw defendant

[2] D. thought that defendant was standing.

point the gun at A.'s "[h]igher upper body" and shoot the gun. D. estimated that defendant was within one or two feet of A. when he shot the gun.

Defendant got up and ran after he shot A. At first, A. did not realize that he had been hit. He and D. ran to A.'s cousin's house. It was then that A. began to feel pain in his shoulder. Blood started coming through his shirt, and he went to the hospital. He had a bullet hole in the front and back of his shoulder. D. was not hurt.

A. stayed home from school the following day and started looking on the Internet, specifically MySpace, for the shooter.[3] He searched for four or five hours with no luck. A.'s friend came to his house to help him search. Based on information from his friend, he ran a search for "'Live by the gun, die by the gun,'" a phrase defendant had on his MySpace page. Defendant's MySpace page contained defendant's photograph. There was a photograph of defendant holding a Sidekick 3 phone, but A. could not identify it as definitely being the one defendant took from him. A.'s parents called the police.

A. identified defendant from a photographic lineup. D. identified another person as the shooter. A. was positive at trial that defendant was the person who shot him.

D.S. had been granted immunity in exchange for his testimony. D.S. and defendant were with some friends when A. and D. walked by. Defendant said to D.S. that they should go take A.'s phone. D.S. was to watch D. while defendant took A.'s phone. Defendant told A. to give him the Sidekick, and A. responded that he was not

[3] A. explained that MySpace was a set of profiles of people and that people had their information and pictures on their profiles.

giving up his phone. Defendant then pulled out the gun and shot into the ground. Up to that point, D.S. had not known that defendant had a gun. Defendant tried to grab the phone from A. A. grabbed at the gun to move it out of the way. At this point, the gun was fired again. D.S. indicated at the time the gun was shot, defendant was pointing it at A. D.S. admitted that he saw defendant point the gun at A. and then shoot.

D.S.'s testimony in court was the first time he testified (he was only contacted by police about two months prior to trial), and he admitted in front of the jury that he had been granted immunity.

Riverside County Sheriff's Deputy Christopher Katz responded to the hospital where A. was taken after the shooting. Deputy Katz spoke with A. while he was in the emergency room being treated for the gunshot wound to his shoulder. The bullet had gone into the front of A.'s shoulder and out the back.

Deputy Katz directed another deputy to go to the cross streets of Lasselle and Iris to look for evidence. A single .22-caliber casing was found in the area. Deputy Katz spoke with D. D. said he recognized the nonshooter suspect and thought his name was D.S. Deputy Katz was unable to locate D.S. at that time. Nothing was found in defendant's room after a search of the apartment where he was staying.

B. *Defense*

Deidre Smith, defendant's aunt with whom he was living at the time of the crime, claimed defendant bought the Sidekick telephone shown in his MySpace photographs

from her daughter. As far as Smith was aware, defendant did not have a gun in the house. Defendant also presented an expert on witness identification.

III

INSUFFICIENCY OF EVIDENCE TO SUPPORT CONVICTION OF ATTEMPTED MURDER

Defendant contends that the evidence was insufficient to support his attempted murder conviction as there was insufficient evidence that he possessed the intent to kill A.

A. *Standard of Review for Sufficiency Claims*

"We often address claims of insufficient evidence, and the standard of review is settled. 'A reviewing court faced with such a claim determines "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citations.] We examine the record to determine "whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] Further, "the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.]" (*People v. Moon* (2005) 37 Cal.4th 1, 22.)

B. *Substantial Evidence Supported the Jury's Finding That Defendant Committed Attempted Murder*

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citations.]" (*People v. Lee* (2003) 31 Cal.4th 613, 623.) An intent to kill means express malice, which is the desire that one's act result in death or the substantial certainty that it will do so. (*People v. Smith* (2005) 37 Cal.4th 733, 739.)

"One who intentionally attempts to kill another does not often declare his state of mind either before, at, or after the moment he shoots. Absent such direct evidence, the intent obviously must be derived from all the circumstances of the attempt, including the putative killer's actions and words. Whether a defendant possessed the requisite intent to kill is, of course, a question for the trier of fact." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946 (*Lashley*).)

"'The act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . ." [Citation.]' [Citations.]" (*People v. Smith, supra,* 37 Cal.4th at p. 741.) "'"The fact that the shooter may have fired only once and then abandoned his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance. Nor does the fact that the victim may have escaped death because of the shooter's poor marksmanship [does not] necessarily establish a less culpable state of mind." [Citation.]' [Citation.]" (*Ibid*.)

In *Lashley*, the victim, who was African-American, walked by an apartment complex with several of his friends who were also African-American. Defendant, who was Caucasian, was on the balcony of a nearby apartment complex and made racially charged comments to the victim and his friends. A heated exchange occurred culminating in defendant shooting the victim in the lung with a .22-caliber rifle. (*Lashley*, *supra*, 1 Cal.App.4th at pp 943-944.) The court noted (in upholding the conviction of attempted murder) that "[t]he very act of firing a .22-caliber rifle toward the victim at a range and in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill under the circumstances presented here." (*Id.* at p. 945.) The court noted that firing a bullet at point-blank range creates a "strong inference that the killing was intentional . . . ." (*Ibid.*)

Here, according to A., defendant shot into the ground when A. first refused to give defendant his phone. Defendant then took the phone by force and ran. A. ran after him. A. testified that defendant fell to the ground, pulled the gun from his pants, and shot at him while he was standing within one foot. A. believed that defendant was aiming at his face. D. recalled that defendant was standing and pointed the gun directly at A.'s upper torso and shot at him while within one or two feet. D.S. testified that defendant never ran away after taking the phone and that he and A. struggled over the phone. However, D.S. testified that he observed defendant point the gun at A. and shoot at him.

Regardless of whom the jury believed, all of the witnesses testified that defendant pointed the gun directly at A.'s body and shot at him while within one to two feet. Under

the previously cited authority, this clearly was evidence from which the jury could infer defendant intended to kill A. (*Lashley*, *supra*, 1 Cal.App.4th at p. 945.) Moreover, defendant shooting into the ground showed he knew the difference between scaring A. and actually trying to kill him. Additionally, defendant did not aim at A.'s arm or leg; he aimed directly at his torso, where the shot was much more likely to hit a vital organ and kill him. Under the circumstances of this case, the evidence clearly established that defendant had the intent to kill A.

Defendant states that there was no attempt to kill because he was not a hardcore gang member, he was "an immature 15-year-old kid," he used a low-caliber weapon, he only shot A. once in the shoulder, and A. did not fall to the ground. None of these circumstances negates the intent to kill. Certainly a person can possess the intent to kill at age 15 and without being a member of a gang. Moreover, defendant completely disregards the fact that even though the weapon used was a .22 caliber, defendant shot at A. when he was only one or two feet away. The bullet went in and out of A.'s body, showing a significant amount of force. Finally, the fact that A. was lucky enough not to be killed by the single bullet was merely fortuitous and not evidence that defendant lacked the intent to kill.

Defendant attempts to distinguish *Lashley* by arguing that *Lashley* showed an intent to kill under the particular circumstances of that case, i.e. the shooting was racially motivated, and the victim had threatened the defendant. We believe the evidence here shows just as clearly that defendant possessed the intent to kill. Unlike in *Lashley*, where

the shooter was on a balcony far away from the victim, defendant was within one or two feet of A. when he shot at him. If defendant was clearly just trying to flee with the phone, he could have fired another warning shot or aimed at A.'s leg. Rather, according to all of the witnesses, defendant stood within one to two feet of A. and aimed directly at his torso before shooting him. He then fled the scene with A.'s phone. It was a reasonable inference from the evidence before the jury that this showed defendant had the intent to kill A.

IV

INSTRUCTIONAL ERROR AND RESPONSE TO JURORS

Defendant's second contention actually presents two claims. First, he contends that the standard CALCRIM No. 600 instruction is erroneous. Second, he claims that the trial court erred by referring the jurors back to the already-given instructions on attempted murder rather than clarifying the intent to kill. We will discuss the two contentions separately.

A. *CALCRIM No. 600*

The jury was instructed with the standard CALCRIM No. 600 as follows: "The defendant is charged in Count 1 with attempted murder. To prove that the defendant is guilty of the attempted murder the People must prove that, one, the defendant took at least one direct but ineffectual step toward the killing of another person. And, two, the defendant intended to kill that person. A direct step requires more than merely planning or preparing to commit murder or arranging for something needed to commit murder. A

direct step is one that goes beyond planning and preparation and shows that a person is putting his plan into action. [¶] A direct step indicates a definite and unambiguous intent to kill. It is a direct movement towards the commission of a crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt. A person who attempts to commit murder is guilty of attempted murder[, e]ven if after taking a direct step towards the killing, he abandons further effort to complete the crime or his attempt fails or is interrupted by someone or something beyond his control."

A claim identical to defendant's was recently rejected in *People v. Lawrence* (2009) 177 Cal.App.4th 547, 556-557.) In *Lawrence*, the court found, "We conclude CALCRIM No. 600 correctly states the law. The challenged language is virtually identical in meaning to the analogous portion of CALJIC No. 8.66 (attempted murder), which states: 'However, acts of a person who intends to kill another person will constitute an attempt where those acts clearly indicate a certain, unambiguous intent to kill.' . . . That portion of CALJIC No. 8.66 was derived from the more general attempt instruction, CALJIC No. 6.00 (attempt-defined). [Citation.] The California Supreme Court has held that CALJIC former No. 6.00, which instructed in pertinent part that acts are sufficient when they '"clearly indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design,"' correctly stated the law. [Citation.] We see no substantive difference

between the language of CALCRIM No. 600 and the language approved [by the California Supreme Court]." (*Id.* p. 557, italics omitted.)

The *Lawrence* court continued, "When the challenged portion of CALCRIM No. 600 is considered in context, it is clear there is no reasonable likelihood jurors understood it as appellant asserts. [Citations.] The instruction as a whole makes it clear that in order to find an attempt, the jury must find two distinct elements: an act and an intent. These elements are related; usually, whether a defendant harbored the required intent to kill must be inferred from the circumstances of the act. [Citation.] Read in context, it is readily apparent the challenged language refers to the act that must be found, and is part of an explanation of how jurors are to determine whether the accused's conduct constituted the requisite direct step or merely insufficient planning or preparation." (*People v. Lawrence, supra,* 177 Cal.App.4th at p. 557.)

We find that *Lawrence* is well reasoned and follow it here. Defendant attempts to distinguish *Lawrence* in his reply brief by claiming that the jury was confused about the intent-to-kill element. However, defendant's argument does not go to whether the instruction was legally correct, the argument raised in the opening brief. His attempts to distinguish *Lawrence* are purely an argument that the jury misapplied the instruction. Since that issue was not raised in the opening brief, we will not consider it here.

Moreover, even if we were to conclude that the language in CALCRIM No. 600 was erroneous, we would find no error here. "In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what

meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights." (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585.) "'"[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction."' [Citations.]" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.)

Instructional error involves state law and is reviewed under the harmless-error standard as stated in *People v. Watson* (1956) 46 Cal.2d 818. A "'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Id.* at p. 836.)

Viewing the instructions as a whole that were given in the instant case, we find that the jury would have found both an act and intent. CALCRIM No. 225 instructed the jurors that they must find that the defendant not only committed the acts, but also did so with the requisite intent to kill. They were also instructed with CALCRIM No. 252 that there must be a union of act and intent. It clearly stated, "For you to find a person guilty of these crimes . . . , that person must not only intentionally commit the prohibited act but must do so with a specific intent and/or mental state." Further, CALCRIM No. 600 emphasizes that the jury must find that defendant took a "direct but ineffective step

toward the killing another person" *and* had an intent to kill. Based on the foregoing, there is no likelihood that the jury was confused by the given instructions.

B. *Response to Jury Questions*

Defendant's second claim is that the trial court should have provided further instruction to the jury on intent to kill as their questions clearly showed that they were confused about the element. During deliberations, the jury first asked, "[M]ay we see a copy of Penal Code 664/187 as well as code section 12022.53, subdivision (d), and 1192.7, subdivision (c), subsection (8)." The jurors were referred back to the instructions on attempted murder and personal use of a firearm. The jurors also asked that the stipulations be read to them again and for the testimony of D.S. D.S.'s testimony was read to the jury. The jury then asked, "May we have clarification on page 28, item 2 of the jury instructions?" The referenced material was the standard instruction on CALCRIM No. 600. "Item 2" was the language, "The defendant intended to kill that person."

The trial court brought the jury into the courtroom. The trial court first referred to the "answer book," which was presumably the instructions.

The trial court then stated as follows: "And, once again, the answer book has all the answers. [¶] '2. The defendant intended to kill that person.' That is a short, succinct sentence. All right? If you turn to another page in the answer book, that has to do with circumstantial evidence. [¶] 'The people must prove not only the defendant did the acts charged but also that he acted with particular intent and/or mental state.' And it goes on

to describe how one goes about that process. [¶] All right? It is up to you to determine yea or nay on each count, guilty or not guilty; true or not true on each finding, absolutely. . . . [W]e have no business directing you in any particular way. But I think that is pretty clear in the instructions how to get and take that path to a decision. All right?" When the jury apparently made no response, the trial court stated, "Say something to me. You don't think so? Yes?" The jurors responded in the affirmative.[4]

Juror 10 then asked from which page the trial court was reading, and the trial court responded it was on page 8. The trial court then told the jury, "But you didn't listen to me the first time about going to the jury instructions. So come on. There's lots of good stuff that applies to the entire spectrum of this case. And questions arise, that's where you're going to find . . . an answer on these topics. And talk it through best you can. Okay?" The jurors indicated that they understood. The trial court also encouraged the jurors to send a note if something else came up. There was no objection by counsel.

The jury then asked if they could consider defendant's behavior during trial, to which the trial court simply responded in writing, "no." There were no further questions from the jurors.

Initially, we conclude that defendant has waived the issue on appeal by failing to object to the response by the trial court. "When a trial court decides to respond to a jury's note, counsel's silence waives any objection under section 1138. [Citation.]"

---

[4] The instruction to which the trial court referred for intent or mental state was CALCRIM No. 225.

(*People v. Roldan* (2005) 35 Cal.4th 646, 729, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22.) Here, defendant waived any objection because his counsel, who was present at the time the trial court responded to the jury, remained silent while the trial court referred the jury back to the already-given instructions.

Defendant claims that if we find he waived the instant claim, that he received ineffective assistance of counsel. We thus address defendant's claim on the merits to the extent necessary to consider the ineffective assistance claim. Because we conclude the court did not err by referring the jurors back to the already-given instructions, the failure to object did not constitute ineffective assistance of counsel. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1204.)

Section 1138 provides, "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court."

Once in the courtroom, "[t]he court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky. [Citation.] . . . But a court must do more than figuratively throw up its hands and tell the jury it

cannot help. It must at least consider how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97, italics omitted.)

Here, the jury was clearly concerned with what constituted intent to kill. The trial court did not abuse its discretion by referring the jurors back to the instructions. The original instructions were full and complete.

Moreover, rather than just refer the jurors back to CALCRIM No. 600, the trial court also referred the jurors to the written CALCRIM No. 225. That instruction emphasized that in committing the attempted murder "[t]he People must prove not only that the defendant did the acts charged, but also that he acted with a particular (intent/ and/or mental state)." Clearly, the jury was informed that not only must it find that defendant shot at A., but also that he possessed the requisite intent to kill.

We also disagree with defendant that the People's argument to the jury mandated that the trial court give further legal guidance to the jury. During argument, the prosecutor clarified that the direct step taken by defendant was shooting A. The People argued, "We know the defendant intended to kill. This one is actually kind of easy. Pull out a gun, a rifle, you pump it to load it, point it at somebody's chest, and you fire. What is that person intending on doing? Kill that person. That's a commonsense answer." The prosecutor also argued, "That's because pointing a gun at somebody means one thing and one thing only. Pointing a gun at another person and firing, pulling the trigger,

means one thing and one thing only. I'm trying to kill you." The prosecutor also stated that if a person walks up to another person and shoots him and kills him, that is murder. If the person survives, it is attempted murder.

Defense counsel argued that there was no intent to kill A. because defendant only shot the gun once, and A. did not fall to the ground; in fact, he did not know he had been shot. Defense counsel suggested that it was D.S. who was the shooter. Defense counsel also stated, "[The prosecutor] also told you if you shoot and kill somebody it's murder. So if you shoot and don't kill, it must be attempted murder. That's also not true."

The People clarified that intent is in the fact of pointing and shooting a gun at someone. The People also stated that a person does not get a "free shot" at someone in response to the argument by counsel that defendant only shot once.

We do not agree with defendant that such argument confused the jury. The prosecutor could argue that defendant's intent was shown by the fact that he raised the gun and shot directly at A. As set forth, *ante*, numerous cases have found that such evidence is sufficient to support a conviction of attempted murder. Moreover, the instructions given to the jury clearly required an act and that defendant possess the requisite intent to kill as supported by the circumstantial evidence. Although the jury asked questions regarding intent to kill, there is absolutely no inference that the jurors did not understand the instructions and follow them once they were directed to the relevant instructions. After advising the jurors to refer back to the given instructions, the trial court advised the jurors that they should ask more questions if they were still confused.

The jury asked no further questions. We must presume that the jurors followed the given instructions, which clearly required that they find defendant not only committed the act of shooting at A., but he also possessed the intent to kill as evidenced by the circumstantial evidence of defendant's intent surrounding the shooting. (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1171.) Moreover, if the jury had interpreted the prosecutor's argument and instruction that once defendant took the direct step to shoot A., he necessarily had the intent to kill, it would have automatically found defendant guilty and would not have asked a question on the requisite intent to kill. Neither the given CALCRIM No. 600 instruction nor the response to the jury during deliberations affected this determination. The instructions given were full and complete, and the jury presumably followed them in finding defendant possessed the requisite intent to kill.

V

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P.J.

MILLER
J.